A

Diamex Sdn Bhd v Ivory Indah Sdn Bhd & Ors

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 21NCVC-54–09 OF 2015
S NANTHA BALAN J
14 JUNE 2016

C *Civil Procedure — Striking out — Application to strike out action — Whether plaintiff's writ and statement of claim disclosed reasonable cause of action — Whether writ was abuse of process — Locus standi — Whether as unsecured creditor plaintiff had locus standi to invoke ss 47 and 52 of the Bankruptcy Act 1967 ('the Act') — Whether ss 47 and 52 of the Act applied to facts of present case* D *— Whether plaintiff's reliance on ss 24(4) and 48(1)(a) of Act was misplaced — Whether plaintiff had any rights, entitlement or claims over land — Whether land sold to first defendant at an undervalue — Whether there were serious questions to be tried*

E By way of a sale and purchase agreement dated 6 August 2007 and supplemented on 30 January 2008 ('the SPA'), Ivory Indah Sdn Bhd ('the first defendant') agreed to purchase a piece of land situated in Pulau Pinang ('the land') from one Dato' Krishna Kumar Sharma ('Dato' Sharma') for RM50m. At the material time the land was charged to the Malaysian Assurance Alliance F Sdn Bhd ('MAA'). When Dato' Sharma failed to fulfill his obligations under the SPA, the first defendant filed a suit against Dato' Sharma and obtained an order of court for specific performance of the SPA and for the land to be transferred to the first defendant ('the order of court'). Subsequent thereto and at the first defendant's request, the third defendant granted the first defendant G financing facilities to, inter alia, finance the purchase of the land. The facilities were to be secured, inter alia, by a first legal charge over the land. Consequently, the land was transferred to the first defendant on 5 September 2013 and the charge in favour of the third defendant was also registered over the land on 5 September 2013. In the meantime, Dato' Sharma had been adjudicated a H bankrupt by adjudicating and receiving orders dated 7 May 2010 and 22 October 2010. Thus, the Director General of Insolvency ('the DGI'), the fifth defendant, acted for and on behalf of Dato' Sharma, the bankrupt, in the transfer of the land to the first defendant and in the creation of the charge in favour of the third defendant, as per the order of court. Diamex Sdn Bhd ('the I plaintiff'), an unsecured creditor of Dato' Sharma, filed the present action against the defendants claiming, inter alia, a declaration that the transfer of the land to the first defendant was invalid and void, a declaration that the charge in favour of the third defendant was invalid and void, and injunctions to restrain the first defendant from completing the sale of the land to the fourth

defendant. The plaintiff also sought to set aside the order of court. It was the plaintiff's argument that the sale and transfer of the land from Dato' Sharma to the first defendant was invalid due to the doctrine of relation back under ss 47 and 52 of the Bankruptcy Act 1967 ('the Act'). The plaintiff also submitted that the land was sold to the first defendant at an undervalue. Hence the plaintiff contended that the land should revert to the DGI to be administered under Dato' Sharma's estate in bankruptcy for the benefit of his unsecured creditors, including the plaintiff. The first defendant submitted that it was the registered owner of the land and the third defendant bank was the registered legal chargee of the land, while the plaintiff was an unsecured creditor of Dato' Sharma. According to the defendants the plaintiff as an unsecured creditor had no locus standi to rely on ss 47 and 52 of the Act or set aside the order of court and had no legal or equitable interest in the land. As for the injunction, the defendants submitted that there was no serious issue to be tried. The first, third and fifth defendants had thus filed the present applications to strike out the plaintiff's writ and statement of claim pursuant to O 18 r 19 of the Rules of Court 2012.

Held, allowing the striking out applications with costs of RM20,000 to each of the first, third and fifth defendants:

(1) In the present case, the plaintiff had filed a proof of debt and thereby prima facie established that it was an unsecured creditor of Dato' Sharma. Under s 52 of the Act, any settlement of property (not being, inter alia, a settlement made in good faith of a purchaser or encumbrance in good faith and for valuable consideration) made within two years of five years prior to the bankruptcy should be void against the DGI. As such, it was only the DGI who had locus standi to take action to assert any claim with respect to the land but the DGI in the present case was not asserting any such claim against the land. In fact, the DGI had not impugned the validity of the order of court but acted for and on behalf of Dato' Sharma, the bankrupt, in the transfer of the land to the first defendant and in the creation of the charge in favour of the third defendant. In the circumstances, the plaintiff as an unsecured creditor had no rights, entitlement or claims in or over the land and had no locus standi to make the present claim in respect of the land (see paras 8–9).

(2) Based on the case law it was clear that ss 47 and 52 of the Act only applied to a settlement prior to the bankruptcy of the settlor. In the present case, the SPA was executed on 6 August 2007 and supplemented on 30 January 2008, while the transfer the land to the first defendant and the charge in favour of the third defendant was effected on 5 September 2013. Dato' Sharma had been adjudicated a bankrupt by adjudicating and receiving orders dated 7 May 2010 and 22 October 2010. Thus, the transfer of the land and the creation of the charge was after Dato'

Sharma's adjudication as a bankrupt and ss 47 and 52 of the Act would not apply to the facts and circumstances of the present case (see paras 49–50).

(3) The plaintiff's reliance on ss 24(4) and 48(1)(a) of the Act was misplaced as the argument ignored s 8(2) of the Act. It was clear that by virtue of s 8(2) of the Act, the land stood outside the bankruptcy and the secured creditor of the land at the material time ie MAA, was entitled to deal with the land in any manner it thought fit (see paras 52–53).

(4) The plaintiff's argument that the land was sold to the first defendant at an undervalue had no merit. It was clear based on the government valuation report that the sale of the land by Dato' Sharma to the first defendant for RM50m was not at an undervalue (see para 39).

(5) In so far as the application for an injunction was concerned, there were no serious questions to be tried and in any event, damages were an adequate remedy (see para 35).

(6) As for the striking out applications, the plaintiff's writ and statement of claim disclosed no reasonable cause of action and was a manifestation of an abuse of process (see paras 60–61).

[Bahasa Malaysia summary

Melalui perjanjian jual beli bertarikh 6 Ogos 2007 dan perjanjian tambahan pada 30 Januari 2008 ('PJB'), Ivory Indah Sdn Bhd ('defendan pertama') bersetuju membeli sebidang tanah yang terletak di Pulau Pinang ('tanah') daripada seorang bernama Dato' Krishna Kumar Sharma ('Dato' Sharma') bagi jumlah RM50 juta. Pada masa itu, tanah tersebut dipajak pada Malaysian Assurance Alliance Sdn Bhd ('MAA'). Apabila Dato' Sharma gagal memenuhi obligasinya bawah PJB, defendan pertama memfailkan saman terhadap Dato' Sharma dan memperoleh perintah mahkamah bagi pelaksanaan spesifik daripada PJB dan agar tanah tersebut dipindahkan kepada defendan pertama ('perintah mahkamah'). Selepas itu dan atas permintaan defendan pertama, defendan ketiga memberi kemudahan pembiayaan kepada defendan pertama untuk, antara lain, membiayai pembelian tanah. Kemudahan ini diperoleh melalui, antara lain, pajakan pertama sah atas tanah. Oleh itu, tanah tersebut dipindahkan kepada defendan pertama pada 5 September 2013 dan pajakan yang memihak pada defendan ketiga juga didaftarkan atas tanah tersebut pada 5 September 2013. Dalam pada itu, Dato' Sharma diisytiharkan bankrap oleh perintah penghakiman dan penerimaan bertarikh 7 Mei 2010 dan 22 Oktober 2010. Oleh itu, Ketua Pengarah Insolvensi ('KPI'), defendan kelima, bertindak untuk dan bagi pihak Dato' Sharma, si bankrap, dalam pindah milik tanah kepada defendan pertama dan dalam membentuk pajakan yang memihak pada defendan ketiga, sebagai satu perintah mahkamah. Diamex Sdn Bhd ('plaintif'), pemiutang tidak bercagar Dato' Sharma, memfailkan tindakan ini terhadap defendan memohon, antara lain, satu deklarasi bahawa pindah milik

tanah kepada defendan pertama adalah terbatal dan tidak sah; satu deklarasi bahawa pajakan tersebut yang memihak pada defendan ketiga terbatal dan tidak sah, dan injunksi untuk menghalang defendan pertama daripada melengkapkan jualan tanah kepada defendan keempat. Plaintif juga memohon untuk mengetepikan perintah mahkamah. Plaintif menghujahkan bahawa jualan dan pindah milik tanah daripada Dato' Sharma kepada defendan pertama tidak sah disebabkan oleh doktrin kebelakangan bawah ss 47 dan 52 Akta Kebankrapan 1967 ('Akta'). Plaintif juga menghujahkan bahawa tanah tersebut dijual kepada defendan pertama pada nilai yang kurang. Oleh itu plaintif menegaskan bahawa tanah tersebut harus dikembali kepada KPI untuk ditadbir estet Dato' Sharma dalam kebankrapan faedah pemiutang tidak bercagar, termasuk plaintif. Defendan pertama menghujahkan bahawa ia adalah pemilik berdaftar tanah dan defendan ketiga adalah pemegang gadaian berdaftar tanah yang sah, manakala plaintif adalah seorang pemiutang tidak bercagar Dato' Sharma. Menurut defendan, plaintif sebagai pemiutang tidak bercagar tidak mempunyai locus standi untuk bergantung pada ss 47 dan 52 Akta atau mengetepikan perintah mahkamah dan tidak mempunyai kepentingan undang-undang atau ekuiti dalam tanah itu. Bagi injunksi tersebut, defendan menghujahkan bahawa tidak ada isu yang serius untuk dibicarakan. Defendan pertama, ketiga dan kelima memfailkan permohonan ini untuk membatalkan writ dan pernyataan tuntutan bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 plaintif.

Diputuskan, membenarkan permohonan membatalkan dengan kos sebanyak RM20,000 kepada defendan pertama, ketiga dan kelima:

(1) Dalam kes ini, plaintif telah memfailkan bukti hutang dan dengan itu terbukti secara prima facie bahawa ia adalah pemiutang tidak bercagar Dato' Sharma. Di bawah s 52 Akta, apa-apa penyelesaian harta (yang bukan, antara lain, penyelesaian yang dibuat dengan niat yang baik oleh pembeli atau halangan dengan suci hati dan dengan balasan bernilai) dibuat dalam tempoh dua tahun daripada lima tahun sebelum kebankrapan harus terbatal terhadap KPI. Oleh itu, hanya KPI yang mempunyai locus standi untuk mengambil tindakan untuk menuntut apa-apa tuntutan berkenaan tanah tetapi KPI dalam kes ini tidak menegaskan apa-apa tuntutan terhadap tanah. Malah, KPI tidak mempersoalkan kesahihan perintah mahkamah tetapi bertindak untuk dan bagi pihak Dato' Sharma, si bankrap, dalam pindah milik tanah tersebut kepada defendan pertama dan dalam pewujudan pajakan memihak kepada defendan ketiga. Dalam keadaan ini, plaintif sebagai pemiutang tidak bercagar tidak mempunyai hak-hak, hak atau tuntutan atas tanah dan tidak mempunyai locus standi untuk membuat tuntutan berkenaan dengan tanah (lihat para 8–9).

(2) Berdasarkan kes undang-undang, jelas bahawa ss 47 dan 52 Akta hanya digunakan untuk penyelesaian sebelum kebankrapan pembuat amanah.

Dalam kes ini, PJB dimasuki pada 6 Ogos 2007 dan perjanjian tambahan pada 30 Januari 2008, manakala pindah milik tanah kepada defendan pertama dan pajakan yang memihak kepada defendan ketiga dimasuki pada 5 September 2013. Dato' Sharma diisytiharkan bankrap oleh perintah penghakiman dan penerimaan bertarikh 7 Mei 2010 dan 22 Oktober 2010. Oleh itu, pindah milik tanah dan pewujudan pajakan selepas pemutusan Dato' Sharma sebagai bankrap dan ss 47 yang 52 tidak terpakai pada fakta-fakta dan hal keadaan kes ini (lihat perenggan 49–50).

(3) Sandaran plaintif pada ss 24(4) dan 48(1)(a) Akta tidak kena pada tempatnya kerana hujahan ini mengabaikan s 8(2) Akta. Jelas bahawa menurut s 8(2) Akta, tanah tersebut tidak terangkum dalam kebankrapan dan pemiutang bercagar tanah pada iaitu masa bahan MAA, berhak menguruskan tanah dalam apa-apa cara yang difikirkan patut (lihat perenggan 52–53).

(4) Hujahan plaintif bahawa tanah tersebut dijual kepada defendan pertama pada nilai yang terkurang tidak bermerit. Jelas berdasarkan laporan penilaian kerajaan bahawa jualan tanah oleh Dato' Sharma kepada defendan pertama untuk RM50m tidak terkurang nilainya (lihat perenggan 39).

(5) Setakat yang permohonan injunksi berkenaan, tidak ada soalan yang serius untuk dibicarakan dan dalam apa jua keadaan, ganti rugi adalah satu remedi yang mencukupi (lihat perenggan 35).

(6) Bagi permohonan pembatalan, writ dan pernyataan tuntutan plaintif tidak mendedahkan apa-apa kausa tindakan munasabah dan adalah satu manifestasi penyalahgunaan proses (lihat perenggan 60–61).]

Notes

For cases on application to strike out action, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9312–9353.

Cases referred to

Besharapan Sdn Bhd & Ors v Agroco Plantation Sdn Bhd & Anor [2007] 1 MLJ 101, CA (refd)

Cheah Theam Swee & Anor v Overseas Union Bank Ltd & Ors [1989] 1 MLJ 426; [1989] 1 CLJ Rep 386, HC (refd)

Chua Tin Hong, ex p Castrol (M) Sdn Bhd, Re [1996] MLJU 608; [1997] 3 CLJ Supp 174, HC (refd)

K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (In Liquidation) v MBf Finance Bhd & Anor [2005] 2 MLJ 201; [2005] 1 CLJ 793, FC (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (refd)

Koh Thong Chuan v The Official Assignee of the Property of Koh Liang Hee, a bankrupt and another appeal [2003] 1 MLJ 113; [2003] 1 CLJ 125, CA (refd)

Malayan Banking Bhd v Boau Yoon Fut @ Wong Yoon Fut (bankrupt represented by the Director General of Insolvency) [2015] 2 MLJ 353, CA (refd)

Malayan Banking Bhd v The Official Assignee [1993] MLJU 416; [1993] 1 LNS 294, HC (refd)

OCBC Bank (M) Bhd v Lee Lee Fah & Ors and another appeal [2000] 1 MLJ 134, CA (refd)

Registrar of Titles, Johore v Temenggong Securities Ltd [1976] 2 MLJ 44, PC (refd)

Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors [1983] 1 MLJ 81; [1983] CLJ Rep 387, FC (refd)

Legislation referred to

Bankruptcy Act 1967 ss 8(2), 24(4), 47, 47(1), 48(1)(a), 52, 53B(3)
National Land Code ss 340, 340(1), (3), 349, 349(3)
Rules of Court 2012 O 18 r 19(1)(a), (1)(b) , (1)(d)

HY Lee (Carol Tiong and Lim Yuwen with him) (Tiong & Woon) for the plaintiff.
Surinder Singh Gill (Ho Sze Yee with him) (Ong & Manecksha) for the first defendant.
Yoong Sin Min (Choo Kuei Yee with her) (Shook Lin & Bok) for the third defendant.
John Khoo (Ismail Khoo & Assoc) for the fourth defendant.
Nurul Ain (Eszanizam Mohamad with her) (Director General of Insolvency, Department of Insolvency) for the fifth defendant.

S Nantha Balan J:

INTRODUCTION

[1] These are my grounds in respect of the following applications:

(a) an application by the plaintiff (encl 4) for injunctions to restrain the first to fourth defendants from dealing with land held under Geran 1272, Lot 2838, Mukim 18, Daerah Timur Laut, Negeri Pulau Pinang ('the land') pending disposal of this action. The land is presently owned by the first defendant ('D1') and charged to the third defendant ('D3'); and

(b) an application by D1 to strike out the writ and statement of claim pursuant to O 18 r 19(1)(a), (b) and (d) of the Rules of Court 2012 and/or under the inherent jurisdiction of this court (encl 51);

(c) an application by D3 to strike out the writ and statement of claim pursuant to O 18 r 19(1)(a), (b) and (d) of the Rules of Court 2012

and/or under the inherent jurisdiction of this court (encl 37); and

(d) an application by the fifth defendant ('D5') to strike out the writ and statement of claim pursuant to O 18 r 19(1)(a), (b) and (d) of the Rules of Court 2012 and/or under the inherent jurisdiction of this court (encl 84).

BACKGROUND FACTS

[2] Before setting out the salient facts, I should state at the outset that on 11 April 2016, the plaintiff withdrew its claim against the second defendant ('D2') with liberty to file afresh and with no order as to costs. In so far as the fourth defendant ('D4') is concerned, they appear to be supporting the plaintiff's application for injunctive relief. D4 did not file any application to strike the suit. I turn now to the background facts:

(a) by a sale and purchase agreement dated 6 August 2007 (as varied by an agreement and a deed of settlement, both dated 30 January 2008) (collectively known as 'the sale agreement'), D1 purchased the land from one Dato' Krishna Kumar a/l TN Sharma ('Dato' KK Sharma'). The purchase consideration was RM50m. At the material time, the land was charged to Malaysian Assurance Alliance Bhd ('MAA') (now known as Zurich Insurance Malaysia Bhd). Dato' KK Sharma failed to fulfill his obligations under the sale agreement and D1 filed Penang High Court Suit No 22–240 of 2008 ('the SP action') and obtained an order of 19 September 2011 ('the 19 September 2011 order') for specific performance of the sale agreement and for the land to be transferred to D1;

(b) to enable the transfer of the land to be effected, D1 applied for and obtained court orders to remove five private caveats lodged on the land and to prohibit the caveators from entering any further caveats on the land. Details of the caveats which were removed are as follows:

(i) by an order dated 12 June 2013, two caveats which were entered by one Markend a/l Dalpatram Joshi were ordered to be removed. Markend a/l Dalpatram Joshi is a director of the plaintiff and had filed affidavits on behalf of the plaintiff in the present proceedings;

(ii) by an order dated 22 January 2013, two caveats entered by D2 on 18 July 2006 and 30 November 2006 were removed; and

(iii) by an order dated 26 December 2012, a caveat which was entered by one Ng Kok Kean was ordered to be removed.

There were no appeals against any of the above orders for removal caveats;

(c) to give effect to the 19 September 2011 order, D1 then obtained a further order on 2 May 2013 ('the 2 May 2013 Order') in the SP action, whereby it was ordered, inter alia, that:

(i) the deputy registrar of the Penang High Court would take all steps and execute the necessary documents on behalf of Dato' KK Sharma (who had by then been adjudicated a bankrupt) to effect the transfer of the land to D1;

(ii) a redemption statement was to be furnished by MAA to D1 and to D1's financier for redemption of MAA's charge over the land; and

(iii) the Director General of Insolvency ('the DGI'), the Department of Insolvency of Malaysia and the Land Registry of Pulau Pinang are to give effect to the 19 September 2011 Order and the 2 May 2013 order;

(d) at all times, sanction had been granted by the DGI for the SP action as Dato' KK Sharma had been adjudicated a bankrupt by adjudicating and receiving orders dated 7 May 2010 and 22 October 2010;

(e) the DGI, representing the estate of Dato' KK Sharma was a party to the 2 May 2013 order;

(f) subsequent thereto and at D1's request, D3 granted to D1, Islamic financing facilities ('the facilities') to, inter alia, finance the purchase of the land. The facilities were to be secured, inter alia, by a first legal charge to be granted by D1 in favour of D3 over the land;

(g) D1 utilised the facilities, of which RM40m was utilised for payment directly to MAA towards redemption of MAA's charge over the land. The balance RM6.15m was paid by D1. Thus, MAA's charge over the land was accordingly discharged;

(h) thereafter, pursuant to the 19 September 2011 order and the 2 May 2013 order, the memorandum of transfer of the land to the D1 was presented to the land office on 5 September 2013. D1 became the registered and beneficial owner of the land on 5 September 2013;

(i) the charge in favour of D3 was also registered over the land on 5 September 2013 under charge presentation No 0799SC20130957 ('the charge'); and

(j) D1 and D4 subsequently entered into a sale and purchase agreement dated 14 January 2015. The purchase consideration was RM150m.

THE PLAINTIFF'S ACTION

[3] The plaintiff filed the present action on 3 September 2015, alleging that it is an unsecured creditor of Dato' KK Sharma and claiming for the following:

(a) a declaration that the 19 September 2011 order and 2 May 2013 order are invalid and void;

(b) a declaration that the transfer of the land from Dato' KK Sharma to D1 is invalid and void;

(c) a declaration that the charge (in favour of D3) is invalid and void;

(d) an injunction to restrain D1 from completing the sale of the land to D4;

(e) an injunction to restrain the defendants, whether by themselves or employees and/or agents or whatsoever from dealing with the land;

(f) a declaration that D2's claim is only an *in personam* action against Dato' KK Sharma. (*Note: this prayer is now redundant as the suit against D2 has been withdrawn*);

(g) an order that the land revert to and be transferred to the estate of Dato' KK Sharma (in bankruptcy) and be administered by D5; and

(h) an order that a registrar's caveat be lodged upon the land pending the transfer of the land to D5.

[4] The issues raised and arguments that were made by the parties were common to the injunction application and the striking out applications. As such, there will be no separate analysis or discussion of the issues and arguments for the injunctions and the striking out, except where it is necessary. The plaintiff's basis for its claim may be summarised as follows:

(a) the plaintiff is an unsecured creditor of Dato' KK Sharma;

(b) the land was sold to D1 at an undervalue; and

(c) the sale and transfer of the land from Dato' KK Sharma to D1 is allegedly invalid and void due to the doctrine of 'relation back' under ss 47 and 52 of the Bankruptcy Act 1967 ('the BA 1967').

[5] Hence, the plaintiff claims that the land should revert to D5 to be administered under Dato' KK Sharma's estate in bankruptcy for the benefit of his unsecured creditors (including the plaintiff).

[6] The plaintiff has also claimed that D5 has failed in its duty in ensuring that all assets and properties of Dato' KK Sharma be liquidated for repayment of debts to his creditors and in carrying out its duty from the aspects of investigation and enforcement in relation to any possible offence that may have been committed by Dato' KK Sharma under the BA 1967. The plaintiff also alleges that the sale of the land by Dato' KK Sharma to D1 was at an undervalue.

[7] With regard to the plaintiff's claim that the land should revert to D5 without any encumbrances whatsoever, it was emphasised by counsel for the defendants that D1 is the registered owner of the land and D3 is the registered legal chargee of the land. They contended that the plaintiff is at most an unsecured creditor of Dato' KK Sharma who makes no claim of any legal right to the land such that it could possibly invalidate the transfer of the land to D1 or the charge. Hence, it was contended that in so far as the injunction application is concerned, there is no serious issue to be tried. Also, it was contended that there are no disputed issues which warrant a full trial of the action and that the action should be struck out.

THE PLAINTIFF'S LOCUS STANDI

[8] The defendants contended that the plaintiff has no locus standi whatsoever to invoke ss 47 and 52 of the BA 1967 as those statutory provisions only apply to the DGI who is the person vested with the estate of the bankrupt and having the requisite power and duty to unravel and claw-back any disposal or transfer of properties of the bankrupt which are rendered void by reason of the doctrine of relation back. It was argued for the defendants that:

(a) s 47 of the BA 1967 provides that the DGI's title to the assets of the bankrupt shall be deemed to have relation back to and commenced at the time of the act of bankruptcy;

(b) Under s 52 of the BA 1967 any settlement of property (not being, inter alia, a settlement made in favour of a purchaser or encumbrance in good faith and for valuable consideration) made within two years or five years prior to the bankruptcy shall be void against the DGI; and

(c) as such, the DGI is the only party who has locus standi to take action and unravel, inter alia, the sale agreement and/or to set aside the orders made in the SP action and make a claim for the land pursuant to the aforesaid provisions.

THE PLAINTIFF HAS NO INTEREST IN THE LAND

[9] According to the defendants, the plaintiff, as an alleged unsecured creditor, has no locus standi to rely on ss 47 and 52 of the BA 1967 and the plaintiff only has a claim in personam against Dato' KK Sharma, and has no legal or equitable interest in the land.

[10] In this regard, the defendants relied on the decision of the Privy Council in *Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44 at p 47, where the Privy Council enunciated that an unsecured creditor had no interest in the debtor's land and was not entitled to maintain a registrar's caveat on the land.

NO LOCUS STANDI TO SET ASIDE SP ORDERS

[11] To the extent that the plaintiff is implicitly seeking to set aside the 19 September 2011 order and the 2 May 2013 order, it was argued that the plaintiff does not have any locus standi to seek to set aside these orders as the plaintiff is neither a party to the SP action or the sale agreement nor does it have any interest in the land. It was contended that the High Court cannot set aside these orders by way of a collateral action brought by a wholly unrelated party.

WHETHER SS 47 AND 52 OF THE BA 1967 ARE APPLICABLE

[12] The main argument centered on whether ss 47 and 52 of the BA 1967 applied to the facts of the present case. At the outset, it was contended by the defendants that ss 47 and 52 of the BA 1967 only apply to a settlement made *prior to the bankruptcy of the settlor*. The sections read as follows:

(a) s 47(1) of the BA 1967:

> The bankruptcy of a debtor ... shall be deemed to have relation back to and commence at the time of the act of bankruptcy being committed on which a receiving order is made against him, or if the bankrupt is proved to have committed more acts of bankruptcy than one to have relation back to and to commence at the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within six months next preceding the date of the presentation of the bankruptcy petition.

(b) s 52 of the BA 1967:

> (1) Any settlement of property, not being a settlement made before and in consideration of marriage or a settlement made in favour of a purchaser or encumbrance in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be absolutely void against the Director General of Insolvency, and shall, if the settlor becomes bankrupt at any subsequent time within five years after the date of the settlement, be void against the Director General of Insolvency, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof.

[13] In support of its proposition that ss 47(1) and 52 of the BA 1967 do not apply to settlements after the bankruptcy of the debtor, reference was made to the case of *Re Chua Tin Hong, ex p Castrol (M) Sdn Bhd* [1996] MLJU 608; [1997] 3 CLJ Supp 174 where Augustine Paul J (as he then was) held that:

I also agree with learned counsel for the second respondent that s 52 of the act is inapplicable.

That section is restricted in its application to settlements made, subject to the qualifications provided therein, prior to the settlor being adjudged a Bankrupt.

As the said property in the appeal before me was transferred after the act of bankruptcy of the Bankrupt the learned SAR's reliance on s 52 of the Act cannot be sustained. (Emphasis added.)

[14] Next, counsel referred to the case *Koh Thong Chuan v The Official Assignee of the Property of Koh Liang Hee, a bankrupt and another appeal* [2003] 1 MLJ 113 at p 122; [2003] 1 CLJ 125 at p 133 g–i, where the Court of Appeal in considering whether the conveyance of a property was void under ss 47 and/or 52 of the BA 1967, held that:

In computing the time for the purpose of relation back under s 47 of the Act in respect of the alleged fraudulent transfer of the said property as an act of bankruptcy, the learned judge, in my view, correctly took the date of the registration of the said property, that is, 26 March 1991 citing *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 rather than the date of the execution of the alleged sale and purchase agreement, that is, 22 September 1990. (Emphasis added.)

[15] In the present case, Dato' KK Sharma was adjudicated a bankrupt on 7 May 2010 and 22 October 2010. The sale and purchase agreement between Dato' KK Sharma and D1 was entered in 2007 and supplemented in 2008 and the transfer of the land and registration of the charge was on 5 September 2013 pursuant to the grant of the 19 September 2011 order and 2 May 2013 order.

[16] Thus, it was contended that since the transfer of the land to D1 and registration of the charge occurred *after the bankruptcy* of Dato' KK Sharma, ss 47 and 52 of the BA 1967 are not applicable. Further, the DGI was a party to the 2 May 2013 order and had knowledge of and had unequivocally and unconditionally endorsed the transfer of the land to D1. It was emphasised that without the DGI's sanction, an unsecured creditor cannot unravel this transaction.

LAND CHARGED TO MAA STANDS OUTSIDE BANKRUPTCY

[17] The next point that was raised by the defendants was that the land stood outside bankruptcy as it was at the material time charged to MAA and redeemed using D3's and the D1's monies. In this regard, it was contended that MAA (as a secured creditor) and the land (as MAA's security) stood outside the bankruptcy of Dato' KK Sharma and the land was not and could not have been included as part of the assets of Dato' KK Sharma's estate in bankruptcy such that it becomes available distribution to the unsecured creditors.

[18] In order to bolster the argument that MAA and the land stood outside bankruptcy, reference was made to s 8(2) of the BA 1967 which reads as follows:

> This section (on the effect of receiving order) *shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed …* (Emphasis added.)

[19] Counsel for the defendants also referred to the case of *Malayan Banking Bhd v The Official Assignee* [1993] MLJU 416; [1993] 1 LNS 294 at p 3, where the court held that:

> Paragraphs 9–17 of Schedule C to the Act concern the proof of debts by secured creditors like the plaintiff. Paragraph 9 allows a secured creditor to realize the security given by the debtor before his bankrupt. This is in consonant with s 8(2) of the Act. Paragraph 10 allows a secured creditor to surrender his security to the official assignee for the general benefit of the creditors. Paragraph 11 allows a secured creditor to value his security and prove for the difference between the value and the amount of his debt. *What can be implied from these paragraphs is that there would be another alternative to be chosen by a secured creditor in respect of the security ie he may rely on his security and stand aside from the bankruptcy proceedings altogether*. So, with these four choices given to a secured creditor by the law, it is for him to choose any one of them in regard to the security. In *Chinese Tin Mines Rehabilitation Loans Board*'s case, Thomson J has this to say at p 66:
>
> > As was pointed out by Jessel MR in the case of *Moor v Anglo-Italian Bank* 10 Ch D 681 whether the creditor stands aside or comes in and proves is a case of election and does not involve any forfeiture of his rights. The [7] creditors has 'two funds to resort to, the bankrupt's general estate, so as to get a dividend on the whole amount of his debt, or his security'.
>
> At p 67, His Lordship went further to state:
>
> > It all comes back to a question of election. The creditor can come in or he can stay out. If he comes in he must submit to his debt being dealt with in accordance with the bankruptcy law which says in effect that only so much of it can count as against the other creditors. *If he stays out he can do anything that the law allows him to do with his security as if there had been no question of bankruptcy. He can realise it or he can retain it*. (Emphasis added.)

[20] Finally, on this point, reference was made to the decision of the Court of Appeal in *Malayan Banking Bhd v Boau Yoon Fut @ Wong Yoon Fut (bankrupt represented by the Director General of Insolvency)* [2015] 2 MLJ 353 at p 359 where the court enunciated the following principle vis a vis a secured creditor:

> In summary, a secured creditor has three 'elections' under bankruptcy law:
>
> (a) *it can stand outside the bankruptcy, and realise its security* (see para 9); or

(b) it can value its security and prove for the difference between this value and the amount of its debt (see para 11); or

(c) it can surrender its security to the DGI for the general benefit of the creditors (see para 10).

(Emphasis added.)

[21] Here, the land was already charged to MAA at the material time. As such, it was submitted that the DGI cannot take a better title to property than what the bankrupt himself had and thus any interest vested in the DGI in respect of the land would have been subject to MAA's charge over the land.

[22] The aforesaid well-established position with regard to the land and the MAA charge was clearly recognised by all parties to the SP action, whereby the 19 September 2011 order and 2 May 2013 order provided for:

(a) a redemption statement to be issued by MAA to enable the discharge of the MAA charge;

(b) thereafter, the balance of proceeds, if any, would only then be paid to the DGI to be administered under Dato' KK Sharma's estate in bankruptcy (see para (j) of the 19 September 2011 order); and

(c) the DGI, the Department of Insolvency of Malaysia and the Land Registry of Pulau Pinang are to give effect to the 19 September 2011 order and 2 May 2013 order.

[23] Counsel for D3 emphasised that the court in the SP action as well as the DGI (who was a party to the 2 May 2013 order) had full knowledge of Dato' KK Sharma's bankruptcy and had provided for the redemption of the MAA charge by D1 or its financier and for the transfer of the land to D1. Hence, it was argued that even if the DGI wanted to now make a claim for the land under s 52 of the BA 1967, the DGI would be estopped from doing so as the DGI was a party to orders made in the SP action and is obliged to give effect to the same.

THE LAND WAS NOT REGISTERED IN THE DGI'S NAME

[24] The next point that was taken up by the defendants is that s 349 of the National Land Code ('the NLC') requires any interest to land to which the DGI has a claim, to be registered with the land registrar and no land or interest shall vest in the DGI until so registered. Section 349(3) of the NLC provides that:

> no land, share or interest shall vest in the Official Assignee under any adjudication of bankruptcy, or order for administration in bankruptcy, until it has become registered in his name pursuant to this section.

[25] Hence, it was argued by the defendants that until the land was registered in the name of the DGI, the DGI has only a beneficial interest in the land. In this regard, reference was made to the case of *Re Chua Tin Hong, Ex P Castrol (M) Sdn Bhd* [1996] MLJU 608; [1997] 3 CLJ Supp 174 (at pp 180–181), where the court observed that:

> As s 24(4) of the Act is subjected to the specific requirements of s 349 of the code it follows that the title to or interest in property of the Official Assignee which consists of land will vest and divest only on registration.
>
> It has been held in a case from New Zealand where the Torrens System is followed with laws similar to s 24(4) of the Act and s 349 of the Code that the registered title of a bankrupt does not vest in the Official Assignee until a transmission is registered in his official capacity as 'The Official Assignee of the property of ... , a bankrupt' inserting the name of the bankrupt and if the bankrupt had transferred his interest in land to some person who had registered the transfer before any transmission was registered by the Official Assignee then the bankrupt's interest would, notwithstanding his bankruptcy, have passed to such person (see *Messiter v Wollerman & Freeman* [1907] 27 NZLR 589).

[26] The above case was followed in the Court of Appeal decision of *Besharapan Sdn Bhd & Ors v Agroco Plantation Sdn Bhd & Anor* [2007] 1 MLJ 101 at pp 107–108, where Arifin Zakaria JCA (as he then was) held that:

> ... Further s 24(4) of the Act has to be read subject to the Land Ordinance, the law governing the property in question. In *Re Chua Tin Hong, Ex P Castrol (M) Sdn Bhd* [1996] MLJU 608; [1997] 3 CLJ Supp 174, Augustine Paul JC (as he then was) had correctly stated the position where he observed that:
>
> ... s 24(4) of the Bankruptcy Act 1967 must be interpreted as being qualified by s 349 of the Code (the National Land Code) as far as land is concerned. As s 24(4) of the Act is subjected to the specific requirements of s 349 of the Code it follows that the title to or interest in property of the Official Assignee which consists of land will vest and divest only on registration and if the Bankrupt had transferred his interest in land to some person who had registered the transfer before any transmission was registered by the Official Assignee then the bankrupt's interest would, notwithstanding his bankrupt, have passed to such person (see: *Messiter v Wollerman & Freeman* [1970] 27 NZLR 589).

[27] Counsel for the defendants submitted that the land was therefore never an unencumbered land, available as part of Dato' KK Sharma's assets for distribution to his creditors.

THE CHARGE IS INDEFEASIBLE

[28] In so far as D3 was concerned, it was contended that D3's interest as a registered chargee is indefeasible pursuant to s 340 of the NLC and the plaintiff has not shown any exceptions to defeat such indefeasibility.

[29] In this regard, it was submitted that D3's interest as a registered chargee is indefeasible under s 340(1) of the NLC unless there is proof that that the charge was created or obtained as a result of:

(a) fraud or misrepresentation to which D3 was a privy; or

(b) forgery, or by means of an insufficient or void instrument; or

(c) unlawful means.

[30] Counsel for D3 emphasised that there was no allegation by the plaintiff that the charge was created or obtained because of any of the aforesaid grounds. In any event, the plaintiff has not shown any exceptions to defeat such indefeasibility. Thus, D3 maintains that the land was properly and lawfully transferred from Dato' KK Sharma to D1 pursuant to the 19 September 2011 order and the 2 May 2013 order, which remain valid and subsisting to date. As such, D3 contended that the charge is indefeasible.

[31] It was also argued on behalf of D3 that even if the transfer of the land to the D1 was somehow unlawful, D3 had acquired its interest as chargee in good faith and for valuable consideration and the charge therefore cannot be defeated. In this regard, reference was made to the proviso to s 340(3) of the NLC which reads as follows:

> Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

[32] Counsel also referred to the decision of the Federal Court in *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81 at pp 83–84; [1983] CLJ Rep 387 at pp 390–391 and the Court of Appeal in *OCBC Bank (M) Bhd v Lee Lee Fah & Ors and another appeal* [2000] 1 MLJ 134 at pp 140–141.

[33] Finally, counsel for D3 also relied on the case of *Koh Thong Chuan v The Official Assignee of the Property of Koh Liang Hee, a bankrupt and another appeal* [2003] 1 MLJ 113 at pp 126 and 128; [2003] 1 CLJ 125 at pp 138 f–h and 141 a–d, where it was enunciated that pursuant to s 53B(3) of the BA 1967, D3 as a subsequent acquirer (chargee) gave valuable consideration and acted in good faith in which case the recourse would be only as against the person who entered into the transaction with the bankrupt.

[34] In the present case, it was emphasised that D1 had purchased the land from Dato' KK Sharma for valuable consideration. D3 obtained the charge over the land in good faith and for valuable consideration, where RM40m had been disbursed towards the redemption of MAA's charge over the land.

WHETHER DAMAGES ARE AN ADEQUATE REMEDY

[35] In so far the injunction is concerned, it was pointed out that the plaintiff is not interested in the land but is merely seeking for the land to be administered as part of Dato' KK Sharma's estate in bankruptcy for the settlement of the unsecured debts of Dato' KK Sharma, including the monetary debt allegedly owing by Dato' KK Sharma to the plaintiff. The land itself is of no particular interest to the plaintiff. As such, it was argued that the plaintiff's concern is clearly monetary in nature. hence, damages would clearly be an adequate remedy to the plaintiff (see *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 at pp 206–207).

NO UNDERTAKING AS TO DAMAGES

[36] In opposing the injunctions, it was argued by the defendants that the plaintiff has not furnished any undertaking as to damages but merely:

(a) in the notice of application for the injunction application, referred to an 'undertaking' via its solicitors attached to Schedule 1 of the said application, where it is stated that the plaintiff would comply with any damages which the court may thereafter order to be paid by the plaintiff;

(b) in para 31 of the plaintiff's affidavit in support (encl 5), the plaintiff states it is prepared to furnish an undertaking as to damages if the court holds that the defendants may suffer damage;

(c) however, when further challenged by D3 (at para 13 of encl 15), the plaintiff then in para 14 of the plaintiff's affidavit (encl 25) continued to refuse to furnish a proper undertaking as to damages and instead states that it is advised that no undertaking as to damages is required;

(d) in this regard, reference was made to a search conducted at the Suruhanjaya Syarikat Malaysia ('SSM') which revealed that there are no details whatsoever of the plaintiff's assets and no audited accounts have been submitted to the SSM since 2005; and

(e) again, when challenged on this, the plaintiff failed to furnish any explanation or provided any proof of its means of satisfying any order for damages.

[37] In this regard, where no undertaking as to damages is furnished or where such undertaking is worthless, the court is entitled to take the same into consideration in refusing to grant an injunction. See:

(a) *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 at pp 206–207; and

(b) *Cheah Theam Swee & Anor v Overseas Union Bank Ltd & Ors* [1989]

1 MLJ 426 at pp 441–442; [1989] 1 CLJ Rep 386 at pp 409–410.

SALE AT AN UNDERVALUE

[38] It was contended by the plaintiff that the sale of the land by Dato' KK Sharma to D1 in 2007/2008 for RM50m was at an 'undervalue' and the plaintiff maintains that the land had a market value of RM150m at the material time. Thus, counsel for the plaintiff contended that there are serious issues to the tried and that an injunction ought to be granted and that the action should not be struck out summarily. It was argued that there should be an investigation at a full trial to determine the plaintiff's status as an unsecured creditor and the circumstances pertaining to the redemption of the charge in favour of MAA.

[39] So far as the 'undervaluation' theory was concerned, the plaintiff relied on private valuation reports to demonstrate that the land had an open market value of RM150m. In response, D1 filed an affidavit (encl 99) (with leave of court) and exhibited a government valuation which shows the land to have a market value of RM50,087,356.59 (exh Y1 — encl 99). The market value was determined as at 23 April 2013, which is the date of inspection of the land by the government valuer.

ANALYSIS AND CONCLUSION

[40] These are my conclusions and they are common to the application for an injunction, namely encl 4 and the striking-out applications, namely, encls 37, 51 and 84.

[41] The first point is the plaintiff's status as an unsecured creditor. Although D3 raised issue with regard to the genuineness of the debt which is said to be owing by Dato' KK Sharma to the plaintiff, it is my view that for present purposes, it can be assumed that the plaintiff is an unsecured creditor and there is no necessity for any discussion or deliberation as to the genuineness of the plaintiff's claim against the estate of Dato' KK Sharma. Counsel for the plaintiff said that there should be a trial to determine whether the plaintiff is a genuinely an unsecured creditor of Dato' KK Sharma. I disagree, as I do not think there has to be a trial merely to establish the plaintiff's status as an unsecured creditor.

[42] In any case, during the course of the current proceedings, it was established that the plaintiff had filed proof of debt. That prima facie establishes that the plaintiff is an unsecured creditor.

[43] I turn now to the main point that was raised by the plaintiff — that the transfer of the land from Dato' KK Sharma to D1 is allegedly invalid and void

pursuant to the doctrine of relation back pursuant to ss 47 and 52 of the BA 1967. In this regard, I agree that under s 47 of the BA 1967, it is the DGI's title to the assets of the bankrupt that shall be deemed to have relation back to and which commenced at the time of the act of bankruptcy.

[44] Further, under s 52 of the BA 1967, any settlement of property (not being, inter alia, a settlement made in good faith of a purchaser or encumbrance in good faith and for valuable consideration) made within two years or five years prior to the bankruptcy shall be void against the DGI. As such, it is only the DGI who has locus standi to take action to assert any claim with respect to the land. In the present case, the DGI is not asserting any such claim against the land. In this regard, it is significant that the DGI was a party to the 2 May 2013 Order in the SP action and is not disavowing or impugning the validity of the orders made in the SP action and the transfer of the land to D1. It was argued that the DGI (even if he wanted to) would be estopped from impugning the orders made in the SP action and/or the transfer of the land to D1 and the charge.

[45] For my part, I find that the issue of estoppel is hypothetical as the DGI is not taking such a stand and in any event, I am not sure if I would go so far as to say that the DGI would be estopped from taking a different position simply because he was a party to the 2 May 2013 Order as the DGI's statutory power (if he chooses to exercise it) cannot in my view be sacrificed on the altar of estoppel as the general position is that the doctrine of estoppel does not usually operate in the face of statutory provisions.

[46] At any rate, it is my view that being an unsecured creditor, the plaintiff has no rights, entitlement or claims in or over the land (see *Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44 (PC)).

[47] Thus, I am of the view that based on the aforementioned reasons, the plaintiff has no locus standi to make the present claim with respect to, inter alia, the land.

[48] The next issue is whether ss 47 and 52 of the BA 1967 apply to the facts and circumstances of the present case. Based on the cases that were cited by counsel for D3, the position in law is clear in that ss 47 and 52 of the BA 1967 only apply to a settlement *prior to the bankruptcy* of the settlor. See *Re Chua Tin Hong, Ex P Castrol (M) Sdn Bhd* [1996] MLJU 608; [1997] 3 CLJ Supp 174 where the court ruled that s 52 BA 1967 *does not apply where the bankrupt's property was transferred after the act of bankruptcy*.

[49] In *Koh Thong Chuan v The Official Assignee of the Property of Koh Liang Hee, a bankrupt and another appeal* [2003] 1 MLJ 113 at p 122; [2003] 1 CLJ

125 at p 133 g–i (CA), the Court of Appeal had to consider whether ss 47 and 52 of the BA 1967 applied in respect of a conveyance of property where the registration took place after the bankruptcy of the debtor. In that case the Court of Appeal held that the *relevant date was the date of registration* and *not the date of execution of the agreement for the sale of the property by the bankrupt*.

[50] In the present case, the agreement between Dato' KK Sharma and D1 for the sale of the land took place on 6 August 2007 and supplemented on 30 January 2008 and the orders in the SP action were dated 19 September 2011 and 2 May 2013 and the land was transferred to D1 and charge in favour of D3 was registered on 5 September 2013. The relevant dates in terms of Dato' KK Sharma's bankruptcy are as follows:

(a) first bankruptcy proceedings — act of bankruptcy occurred on 15 February 2006. He was adjudicated a bankrupt on 22 October 2010; and

(b) second bankruptcy proceedings — act of bankruptcy occurred on 13 January 2006 and he was adjudicated a bankrupt on 7 May 2010.

[51] The plaintiff also claims that as an unsecured creditor, they have a right to mount this action pursuant to s 24(4) of the BA 1967 which states that 'when a debtor is adjudged a bankrupt his property shall become divisible among his creditors and shall vests in the Director of Insolvency'. The plaintiff also invoked s 48(1)(a) of the BA 1967 which describes the bankrupt's property which are divisible amongst creditors. The argument that was taken on behalf of the plaintiff was that the land does not fall within any of the categories mentioned in s 48(1)(a) of the BA 1967 and as such it becomes divisible amongst Dato' KK Sharma's creditors.

[52] I find that the plaintiff's reliance on ss 24(4) and 48(1)(a) of the BA 1967 is misplaced as the argument ignores s 8(2) of the BA 1967 which states that the 'receiving order shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed …'.

[53] It is clear that by virtue of s 8(2) of the BA 1967, the secured creditor (MAA at that time) was free to deal with the land in any manner they wished and they had the option of either relying on their security and standing outside of the bankruptcy or they could surrender their security for the general benefit of the creditors and participate in the distribution of the assets together with all other creditors. The choice is theirs. The position of a secured creditor in terms of their options is clearly illustrated in the following cases:

(a) *Malayan Banking Bhd v The Official Assignee* [1993] MLJU 416; [1993] 1 LNS 294 at p 3; and

(b) *Malayan Banking Bhd v Boau Yoon Fut @ Wong Yoon Fut (bankrupt represented by the Director General of Insolvency)* [2015] 2 MLJ 353 at p 359 (CA).

[54] As was rightly submitted by counsel for D3, at all material times, the land was charged to MAA and the DGI cannot obtain a better title to the land than the bankrupt himself and thus any interest that the DGI had over the land would have been subject to the charge registered in favour of MAA.

[55] The next point is in relation to the registration of the title to the land in the DGI's name. Under s 349 of the National Land Code, any interest to land to which the DGI has a claim must be registered with the Registrar of Land Titles and no land shall vest in the DGI until so vested. See *Re Chua Tin Hong, Ex P Castrol (M) Sdn Bhd* [1996] MLJU 608; [1997] 3 CLJ Supp 174 at pp 180–181 where it was enunciated that title or interest vests with the official assignee only on registration and if the title is transferred to any other person before the official assignee's interest in registered then the bankrupt's interest would have passed to such a person. This was followed by the Court of Appeal in *Besharapan Sdn Bhd & Ors v Agroco Plantation Sdn Bhd & Anor* [2007] 1 MLJ 101 at pp 107–108.

[56] Lastly, it is important to reiterate that the DGI is a party to the present suit (albeit representing the estate of Dato' KK Sharma) and they are not seeking to assert any rights in or over the land or to unravel the sale agreement and/or the orders made in the SP action and/or the transfer of the land to D1 and/or the registration of the charge in favour of D3.

[57] Further, it is significant that the DGI was a party to the 2 May 2013 order, which facilitated that transfer of the land to D1. On the issue of sale by Dato' KK Sharma to D1 at an 'undervalue', it is to be noted that in the foreclosure proceedings known as MT4–24–1342 of 2009, a government valuation was furnished to the court and DGI.

[58] The valuation report is dated 23 May 2013 and the market value of the property was given at RM50,087,356.59 (see exh Y1, encl 99). Based on the said government valuation report, it is clear that the sale of the land by Dato' KK Sharma to D1 for RM50m was not at an undervalue as alleged by the plaintiff.

[59] Here, the DGI supports the arguments that were taken by D3, inter alia, in relation to the rights of MAA as secured creditor to stand outside the bankruptcy and to realise the security (see *K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (In Liquidation) v MBf Finance Bhd & Anor* [2005] 2 MLJ 201; [2005] 1 CLJ 793 (FC)).

THE OUTCOME

[60] For the several reasons as discussed above, I find that the entire premise of the plaintiff's case against D1, D3 and D5 which is predicated, inter alia, on various provisions of the BA 1967, is plainly untenable. To recapitulate, I find that:

(a) as an unsecured creditor of Dato' KK Sharma, the plaintiff has no locus standi to invoke ss 47 and 52 of the Bankruptcy Act 1967 as a claim based on relation back is a matter which falls squarely within the statutory jurisdiction of the DGI who acts for and on behalf of the estate of the bankrupt;

(b) ss 47 and 52 of the Bankruptcy Act 1967 only apply to a transfer of property prior to bankruptcy and as such do not apply to the factual matrix of the present case as the land was transferred and the Charge was registered on 5 September 2013 which is after Dato' KK Sharma's adjudication as a bankrupt which took place on 7 May 2010 and 22 October 2010;

(c) the land stood outside bankruptcy and pursuant to s 8(2) of the BA 1967, MAA was, as a secured creditor, entitled to deal with the land in any manner as they thought fit;

(d) the valuation by the government valuer, which showed that the land had a open market value of RM50,087,000 as at 23 April 2013, repudiates the suggestion of a sale at an undervalue by Dato' KK Sharma to D1;

(e) in as much as the land was not in the name of the DGI at the time when the land was transferred to D1, no claim can be made, even if the DGI wished to do so, by virtue of s 349 of the National Land Code;

(f) a claim based on the doctrine of relation back under ss 47 and 52 of the BA 1967 is not maintainable as the DGI was a party to the 2 May 2013 order in the SP action, which can only mean that the DGI has approved and/or acquiesced to the bona fide and validity of the sale agreement and the 19 September 2011 order and the 2 May 2013 order in the SP action;

(g) D1 and D3 are bona fide purchaser/chargee respectively and their respective rights as registered owner/registered chargee are indefeasible pursuant to s 340 of the National Land Code;

(h) in so far as the application for an injunction is concerned, there are no serious questions to be tried and in any event, damages are an adequate remedy. Also, the plaintiff has not given any meaningful undertaking as to damages and its ability to pay damages is highly doubtful; and

(i) in so far the striking out applications are concerned, it is clear and obvious that there are no issues to be tried or substantial factual disputes which warrant a full trial of the action.

[61] As such, in conclusion, I am of the opinion that the writ and statement of claim discloses no reasonable cause of action and is a manifestation of an abuse of process. I therefore granted order in terms of encls 37, 51 and 84 with costs. Consequently, in so far as encl 4 is concerned, it follows that there are no serious questions to be tried. In any event, in as much as the plaintiff is at most, an unsecured creditor vis a vis Dato' KK Sharma, it is my view that damages are an adequate remedy.

[62] Finally, I find that the balance of convenience does not favour the grant of any injunctive remedy. In this regard, I also find that the plaintiff has not provided any meaningful undertaking as to damages and since the plaintiff's financial standing is at present elusive, the discretion of this court should be to refuse any injunctive relief in favour of the plaintiff. As such, encl 4 is dismissed with costs. As a consequence, D1's application for security for costs (encl 78) is redundant and is struck out and dismissed, with no order as to costs. I will now make the relevant orders as to costs of encls 4, 37, 51 and 84.

COSTS

[63] I order the plaintiff to pay costs of RM20,000 *each* to D1, D3 and D5 in respect of encl 4 (subject to 4% allocator).

[64] I order the plaintiff to pay costs to D1 in respect of encl 51 in the sum of RM20,000 (subject to 4% allocator).

[65] I order the plaintiff to pay costs to D5 in respect of encl 37 in the sum of RM20,000 (subject to 4% allocatur).

[66] I order the plaintiff to pay costs to D5 in respect of encl 84 in the sum of RM20,000 (subject to 4% allocator).

[67] As a result of the orders that were made today, counsel for the plaintiff informed the court that he wished to withdraw the suit against D4 but with liberty to reinstate the suit (in the event the action is resurrected on appeal by the Court of Appeal) and with no order as to costs. Counsel for D4 asked for costs. I took the view that since D4 did not participate in the interlocutory proceedings and had only filed defence and as their removal as a defendant is conditional in that they may be reinstated as a defendant if the plaintiff's appeal to the Court of Appeal is successful, it is I think appropriate that there be no order as to costs. As such, I ordered that the plaintiff's suit against D4 be struck

off with no order as to costs and with liberty to be reinstated as a defendant in the event the plaintiff's appeal to the Court of Appeal against the rulings made in respect of encls 4, 37, 51 and 84 succeeds.

Order accordingly.

Order accordingly.

Reported by Kohila Nesan